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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NO. _____

BUSINESS ELECTRONICS CORPORATION,
Petitioner,

v.

SHARP ELECTRONICS CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I

QUESTION PRESENTED

The jury below found an agreement between the defendant supplier and a non-price cutting dealer to terminate a competing dealer for the purpose of eliminating price competition. On appeal, the defendant supplier did not contest the sufficiency of the evidence supporting this finding. Rather, the question presented here is whether dealer termination pursuant to a conspiracy to eliminate price competition constitutes price fixing in violation of the Sherman Act, absent an express finding of direct agreement on resale price levels.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Business Electronics Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 21, 1986.

OPINION BELOW

The opinion of the court of appeals is reported at 780 F.2d 1212 and appears in the Appendix hereto. The opinion of the district court denying defendant's motions for new trial and judgment n.o.v., which has not been reported, also appears in the Appendix hereto.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1986. A timely Suggestion for Rehearing En Banc was denied on February 20, 1986, and this Petition for Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal. . . .

STATEMENT

1. From 1968 until July 1973, Business Electronics Corporation ("BEC"), owned and operated by Kelton Ehrensberger, was an authorized dealer in Sharp brand electronic calculators in Houston. As such, BEC bought calculators from Sharp Electronics Corporation ("Sharp") and resold them at retail.

Although Sharp suggested resale prices to its dealers and authorized specific discounts from list prices for

certain accounts, BEC frequently sold at lower prices/greater discounts than those authorized by Sharp. Consequently, Sharp's Texas representative, Mr. Burkholder, complained to BEC about this price cutting, noting that BEC was "messing up" the market and "creating dealer complaints." Tr. 73-77, 239-40, 244, PX 52.* When BEC encountered problems in obtaining prompt delivery of preferred models in sufficient quantity, Burkholder said that Sharp was in a position to make inventory problems very "painful" for BEC if it continued to price the machines "arbitrarily." Tr. 79-80.

In mid-1972, Sharp threatened cancellation of BEC's dealership. At this time, Hiroshi Kawai, Sharp's Vice President, told Ehrensberger that he should "clean up his pricing structure." Tr. 81. Almost contemporaneously, Sharp appointed an additional dealer in Houston—Hartwell's Office World, owned and operated by Gil Hartwell. Hartwell soon began a campaign to stop BEC's price cutting. Tr. 174-75. In a July 1972 letter to Ehrensberger, copied to Burkholder, Hartwell wrote that he would not "compete" with BEC for a particular customer "so the customer won't be able to play one of us against the other in a 'discount' situation." Tr. 84-85, PX 40. Regarding this letter, Hartwell testified that he "was making the first step to lending some price stability to Mr. Ehrensberger" and that he intended to charge Sharp's suggested list prices. Tr. 276-77. Hartwell further testified that Ehrensberger was discounting from Sharp's suggested list price and that Hartwell wanted to avoid that. Tr. 278.

Hartwell thereafter complained to Sharp, including Burkholder, Tom Mashos (National Sales Manager),

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* "Tr." refers to the official transcript of the trial record below. "PX" refers to plaintiff's exhibits admitted into evidence below.

and Kawai, about BEC's price cutting, which Hartwell wanted stopped. Tr. 79, 280, 283, 287, 837. Kawai relayed these complaints back to Burkholder and told him to "try to solve the problem." Tr. 628, 629, 636, 639. In October 1972, Burkholder wrote Kawai about "problems created by Ehrensberger," meaning the Hartwell complaints concerning BEC's price-cutting. Tr. 933-34. In December 1972, Hartwell wrote to Kawai complaining again about BEC's "price cutting," PX 39, Tr. 88-90, which he wanted Kawai to correct. Tr. 286. Subsequently, Burkholder told Ehrensberger that he wanted BEC "to maintain the correct discount range." Tr. 91.

In mid-1973, Hartwell did more than complain. He demanded that Sharp terminate BEC for the *express* purpose of stopping the discounting. Hartwell delivered an "ultimatum" to Mashos—because of BEC's price cutting, Hartwell would quit unless Sharp canceled BEC. Within three weeks, Mashos complied with this demand and terminated BEC. Tr. 189-90, 586, 587, 1355-56. Thereafter, Hartwell remained as Sharp's Houston dealer. Tr. 294.

Hartwell's policy was to sell at Sharp's suggested list prices, and he usually adhered to those prices in the years following BEC's termination. Tr. 294-95, 296, 398. Accordingly, Hartwell's gross margin—the difference between his cost of purchasing the product from Sharp and his resail price—increased after BEC was terminated.*

BEC brought this suit under § 1 the Sherman Act, contending that Sharp and Hartwell conspired to terminate BEC for the purpose of eliminating price competition.

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* Hartwell's gross margin increased from 33% in 1972 and 34% in 1973 to 43% in 1974 and 45% in 1975. PX 119, Tr. 1156, 389-91.

2. The district court submitted the following liability interrogatory to the jury:

> Question 1: Do you find by a preponderance of the evidence that there was an agreement or understanding between Sharp and Hartwell to terminate Business Electronics because of Business Electronics' price cutting?

The court instructed the jury that the plaintiff "must show . . . that Sharp and Hartwell knowingly came to a common and mutual understanding to accomplish or attempt to accomplish an unlawful purpose. . . ." Tr. 1584. The court further instructed:

> Plaintiff contends that Sharp terminated Business Electronics in furtherance of Hartwell's desire to eliminate Business Electronics as a price cutting rival. . . . If you find that Sharp did not terminate Business Electronics pursuant to an *agreement . . . with Hartwell to eliminate price-cutting* by Business Electronics, then you should answer 'No' to question No. 1.

Tr. 1587 (emphasis added).

The jury answered Question number 1 affirmatively, found that the conspiracy had injured BEC, and awarded $600,000 in damages. Pursuant to 15 U.S.C. § 4, the district court entered judgment for BEC for treble this amount plus attorneys fees.

After the district court denied Sharp's motions for judgment n.o.v. and for new trial, Sharp appealed to the United States Court of Appeals for the Fifth Circuit.

3. The Fifth Circuit reversed the judgment below and remanded for retrial. Acknowledging that several other

circuits have adopted the standard of liability embodied in the district court's instructions, the court nevertheless rejected the rule that termination of a price-cutting dealer pursuant to a conspiracy to eliminate price competition constitutes unlawful price fixing. According to the Fifth Circuit, unlawful price fixing requires proof of an agreement "to set prices at some level, though not a specific one." 780 F.2d at 1218. Because the jury instructions did not reflect this liability standard, the court found them defective.

Nevertheless, the court held that the evidence was sufficient to support a jury finding that "Sharp and Hartwell reached an agreement as to price." *Id.* at 1219. The court suggested that on remand the district court should ask the jury whether Sharp's decision to terminate BEC was made pursuant to a conspiracy with Hartwell to "fix, maintain or stabilize" resale prices of Sharp electronic calculators. *See id.* at 1218 n.3.

REASONS FOR GRANTING THE PETITION

This appeal concerns a vital but discrete issue of federal antitrust law: whether an agreement between a manufacturer and a dealer to terminate a competing dealer for the purpose of eliminating price competition constitutes a violation of § 1 of the Sherman Act. It is important to recognize what is *not* at issue here. There is no issue whether Sharp and Hartwell agreed to terminate BEC for a price-related reason or whether the evidence satisfied the standard for proving collusion set forth in *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S. Ct. 1464 (1984). There also is no issue as to the sufficiency of the evidence to support a finding of unlawful price fixing even under the standard articulated by the Fifth Circuit. *See* 780 F.2d at 1219.

At trial below, the jury found that Sharp terminated BEC pursuant to an agreement with Hartwell to eliminate price competition. According to the Fifth Circuit, such an agreement falls short of price fixing because it does not directly fix prices. In the Fifth Circuit's view, an agreement to eliminate price competition is not unlawful unless the conspirators also agreed directly "to set resale prices at some level. . . ." 780 F.2d at 1218. As demonstrated herein, imposition of this requirement contravenes the established definition of price fixing adopted by this Court and followed by the federal courts for forty-five years. The Fifth Circuit is the only federal court to adopt this standard, which, by its own admission, places antitrust law in the Fifth Circuit in direct conflict with the law in four sister circuits.

Even worse, the decision below creates a significant loophole in the established antitrust policy against price fixing. By requiring proof of a direct agreement on resale prices, the Fifth Circuit has imposed the near impossible task of proving that manufacturer and competing dealer literally agreed to "fix" retail prices "at some level. . . ." As a result, in the Fifth Circuit, manufacturers will be free to serve as price "policemen" for dealers who want to stop discounting by other dealers. Recognizing the anticompetitive consequences of such conduct, Congress, in recent legislation signed by the President, expressly stated its view that resale price fixing does not require proof of agreement on specific prices. *See* Pub. L. No. 99-180 at § 605, 99 Stat. 1136, 1169-70 (Dec. 13, 1985).

In view of the critical importance of the antitrust prohibition against price fixing, this Court should hear this case to consider the Fifth Circuit's unprecedented and fundamentally erroneous departure from established law.

1. Decisions Of This Court Firmly Establish That An Agreement To Eliminate Price Competition Constitutes Unlawful Price Fixing.

The Fifth Circuit's decision conflicts with decisions of this Court. Long ago, this Court broadly defined illegal price fixing as "a combination formed for the purpose or with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity. . . ." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). As more recently stated by the Court: "Price is the 'central nervous system of the economy,' . . . and an agreement that 'interfere[s] with the setting of price by free market forces' is illegal on its face. . . ." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978).

No federal court has ever before required proof of an agreement "to set prices at some level" as an essential element of price fixing. Indeed, in the seminal *Socony-Vacuum* case, this Court held that the offense of price fixing does not entail prices "fixed in the sense that they were uniform and inflexible. Price-fixing . . . has no such limited meaning." 310 U.S. at 222. Applying this long established concept, this Court recently held that an agreement to eliminate credit terms was "tantamount to an *agreement to eliminate discounting*, and thus [fell] squarely within the traditional *per se* rule against price fixing." *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648 (1980) (emphasis added). In *Catalano*, the Court said:

> In . . . *Socony-Vacuum* . . . we held that a program of buying surplus gasoline on the spot market in order to prevent prices from falling sharply was unlawful without any inquiry into the reasonableness of the program, *even though there was no direct agreement on the actual prices to be maintained*. . . .
>
> Thus we have held agreements to be unlawful per se that had substantially less direct impact than the agreement in this case.

Id. at 647 (emphasis added). The Court further noted that the agreement at issue was "merely one form of price fixing." *Id.* at 650; *accord, United States v. Gasoline Retailers Association*, 285 F.2d 688 (7th Cir. 1961) (agreement not to advertise price is per se illegal price fixing even without direct agreement on price).

Similarly, this Court's decision in *United States v. General Motors Corp.*, 384 U.S. 127, 145-48 (1966), squarely rejected the notion that an agreement to eliminate discounters was somehow less pernicious than a direct agreement to fix prices. Holding that a conspiracy to eliminate discounters was a per se violation of the Sherman Act, the Court reasoned:

> The protection of price competition from conspiratorial restraint is an object of special solicitude under the antitrust laws. We cannot respect that solicitude by closing our eyes to the effect upon price competition of the removal from the market, by combination or conspiracy, of a class of traders. Nor do we propose to construe the Sherman Act to prohibit conspiracies to fix prices at which com-

petitors may sell, but to allow conspiracies or combinations to put competitors out of business entirely.

Id. at 148; *contra, St. Petersburgh Yacht Charters, Inc. v. Morgan Yacht, Inc.*, 457 So.2d 1028 (Fla. Dist. Ct. App. 1984) (sole authority cited by decision below).

Even though the above cases dealt with horizontal price-fixing conspiracies, their holdings are not limited to the horizontal context. In condemning vertical price restraints, this Court has often cited the same broad description of price fixing set out in *Socony*. *See, e.g., Simpson v. Union Oil Co.*, 377 U.S. 13, 18 (1964); *United States v. Parke, Davis and Co.*, 362 U.S. 29, 47 (1960). Logically, an agreement intended to eliminate discounting amounts to price fixing by this definition whether it is vertical or horizontal in nature.

In this regard, the Court held in *Parke, Davis* that direct agreement on resale prices is not a required element of unlawful price fixing. There, a manufacturer refused to deal with wholesalers who charged less than suggested resale prices and enlisted the cooperation of wholesalers in cutting off offending retailers. Even though there was no direct agreement on price, the Court held that the scheme constituted illegal price fixing. The Court said: "[A]n unlawful combination is *not* just such as arises from a price maintenance *agreement*, express or implied; such a combination is *also* organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy." 362 U.S. at 43 (emphasis added in part).

The agreement between Sharp and Hartwell, although vertical in nature, stifled horizontal competition in both

purpose and effect. Having failed to enlist BEC in a horizontal conspiracy to fix prices, Hartwell engaged Sharp to accomplish the same purpose and result by vertical conspiracy. As stated in *General Motors*, the courts should not close their eyes to "the effect upon price competition of the removal from the market, by combination or conspiracy, of a class of traders." 384 U.S. at 148. Whether in the vertical context or the horizontal context, it would not make sense "to construe the Sherman Act to prohibit conspiracies to fix prices at which competitors may sell, but to allow conspiracies or combinations to put competitors out of business entirely." *Id.*

Even if the agreement between Sharp and Hartwell did not directly "fix" prices "at some level," it was clearly intended to destroy price competition in a most effective way—removal of a competitor *because* he refused to honor his competitor's demands for compliance with Sharp's suggested resale prices. Unquestionably, this conspiracy to eliminate price competition, in the words of this Court, "falls squarely within the traditional *per se* rule against price fixing" and is "merely a form of price fixing." 446 U.S. at 648, 650.

2. In Direct Conflict With The Decision Below, At Least Four Other Courts Of Appeals Have Held That Price Fixing Occurs When A Supplier Terminates A Dealer Pursuant To a Conspiracy With A Competing Dealer To Eliminate Price Competition.

The Fifth Circuit acknowledged that its holding in this case directly conflicts with the holdings of four other circuit courts of appeals:

> We recognize that the standard of liability we set forth conflicts with the rule enunciated in *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 170 (3d Cir. 1979) and followed by a number of other circuits.

780 F.2d at 1216. Indeed, every other federal court to consider this question has held that unlawful price fixing occurs when a supplier terminates a dealer pursuant to a conspiracy with a competing dealer to eliminate price competition—the precise jury finding in the instant case. *See Victorian House, Inc. v. Fisher Camuto Corp.*, 769 F.2d 466 (8th Cir. 1985); *Ziddell Exploration, Inc. v. Conval International, Ltd.*, 719 F.2d 1465, 1469 (9th Cir. 1983); *Roesch, Inc. v. Star Cooler Corp.*, 712 F.2d 1235, 1237 (8th Cir. 1983) (en banc), *cert. denied*, 104 S. Ct. 1707 (1984); *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226, 1234 (7th Cir. 1982), *aff'd on other grounds*, 104 S. Ct. 1464 (1984); *Contractor Utility Sales Co. v. Certain-Teed Products Corp.*, 638 F.2d 1061, 1072 (7th Cir. 1981); *Alloy International Co. v. Hoover-NSK Bearing Co.*, 595 F.2d 164, 170 (3d Cir. 1979); *Girardi v. Gates Rubber Co. Sales Division, Inc.*, 325 F.2d 196, 200 (9th Cir. 1963); *see also Trabert & Hoeffler, Inc. v. Piaget Watch Corp.*, 633 F.2d 477 (7th Cir. 1980). The Ninth Circuit's holding in *Ziddell* sharply illustrates this conflict:

> [I]f a manufacturer withdraws its product from a price-cutting distributor at the request of a competing distributor as part of a conspiracy to protect the requesting distributor from price competition, the manufacturer has committed a per se violation of the antitrust laws.

719 F.2d at 1469.

The impact of this conflict is substantial, encompassing all businesses operating in or substantially affecting interstate commerce and subject to the Sherman Act. Uniform interpretation of the issue of law involved—the standard of liability for unlawful price fixing—clearly is vital to efficient business planning at all levels of the chain of distribution. There can be no justification for deciding claims of unlawful price fixing based upon standards of liability which materially differ depending upon the geography of the place of suit.

3. The Decision Below Creats An Unprecedented, Substantial Loophole in the Important Federal Prohibition Against Price Fixing.

Recognizing the direct conflict with the rule accepted in other circuits, and citing no federal case directly announcing a contrary rule, the Fifth Circuit based its holding on inapplicable cases and reasoning that misapprehends the conspiracy found by the jury. No federal court has *ever* held that termination of a dealer pursuant to an agreement to eliminate price competition is anything except an illegal price restraint. The *only* case directly supporting the panel's view is an opinion of a state appellate court in Florida, which is contrary to Supreme Court precedent construing the Sherman Act. *Compare General Motors Corp.*, 384 U.S. at 148, *with St. Petersburgh Yacht Charters*, 1984-1 Trade Cas. at p. 68,337.

There are at least four basic mistakes in the Fifth Circuit's analysis of vertical price fixing. We address them in turn.

a. The Fifth Circuit reasoned that "an agreement to terminate a price cutter does not fix prices at any specific or general level but merely frees the complaining dealer to set prices he chooses." 780 F.2d at 1216. Under comparable reasoning, a bank robber is "free" to return stolen money to the bank, and an agreement to terminate an employee for union membership "frees" the remaining employees to organize, or not, as they choose. Collusive elimination of a discounting dealer may theoretically "free" the complaining dealer to set prices as he chooses, but it takes little imagination to conclude that the dealer will use his new-found "freedom" from price competition to increase price or avoid discounting. After all, it was price cutting which prompted his complaints in the first place. Moreover, other dealers will have been disciplined by example not to offer discounts from stabilized or enhanced price levels. With due respect, the obvious and only purpose of dealer termination pursuant to agreement to eliminate price cutting is, *ipso facto,* to raise, maintain, or stabilize prices.

Permitting a dealer to use a manufacturer as his agent to eliminate a competitor who refuses to fix prices poses dangers to price competition equal to those created by a cartel between the two dealers themselves. Contrary to the reasoning below, the manifiestly anticompetitive effects of an agreement to eliminate price competition are not offset by the absence of a complementary agreement to set prices "at some level." Therein lies the real danger in the court's decision—the creation of a gaping loophole through which a destructive form of price fixing will escape liability under the antitrust laws. Now, in the

Fifth Circuit, a dealer may obtain a manufacturer's agreement to police discounting by other dealers so long as the manufacturer and dealer do not directly agree on "some price level."

b. The court characterized the agreement at issue as similar to the grant of an exclusive distributorship, which, though it may have the effect of raising prices, is not illegal per se. *Id.* But the evidence here demonstrated, and the jury found, *more* than a mere exclusive distributorship agreement which might incidentally affect prices. The district court instructed the jury that it could find an unlawful conspiracy *only* if Sharp terminated BEC "pursuant to an agreement . . . with Hartwell *to eliminate price-cutting* by BEC. . . ." Tr. at 1587. Lawful exclusive distributor agreements do not contemplate this element. Clearly, the grant of an exclusive distributorship on the condition that the distributor not engage in price cutting would itself be illegal per se.

c. The court erroneously relied on cases addressing unilateral dealer termination or nonprice restraints. For instance, the court plainly misread its own decision in *Aladdin Oil Co. v. Texaco, Inc.,* 603 F.2d 1107 (5th Cir. 1979). Focusing narrowly on a passage in *Aladdin* saying that "abstract lessening of competition is not enough" to prove an antitrust violation, *id.* at 1116, the court concluded that *Aladdin* "demonstrates both the error committed in this case and the proper standard of liability." 780 F.2d at 1215. Read in context, however, the *Aladdin* passage concerned refusals to deal which are *not* price-related. Moreover, elimination of price cutting is more than mere "abstract lessening of intrabrand competition." *Ron Tonkin Gran Turismo v. Fiat Distributors,* 637 F.2d 1376, 1388 n.12 (9th Cir.), *cert. denied,* 454 U.S. 831 (1981).

d. Although acknowledging that *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S. Ct. 1464 (1984), "did not expressly disapprove" the rule embodied in the jury instructions below, 780 F.2d at 1218, the Fifth Circuit nevertheless extrapolated the *Monsanto* holding beyond its intended limit. In *Monsanto,* this Court held that concert of action cannot be inferred from mere evidence of dealer pricing complaints followed by termination in response to those complaints. The Court found such evidence to be "highly ambiguous," since it does not exclude the possibility that the manufacturer unilaterally decided to terminate. Thus, *Monsanto* requires the plaintiff to adduce additional "evidence that tends to exclude the possibility that the manfacturer and non-terminated distributor were acting independently." 104 S. Ct. at 1471. Going far beyond this holding, the Fifth Circuit concluded that even an actual *agreement* to terminate because of price cutting does not constitute price fixing, since, the court reasoned, only a "mind reader" could distinguish between such an agreement and unilateral termination in response to dealer complaints. 780 F.2d at 1218. The court's reasoning will not withstand analysis.

First, *Monsanto* dealt only with the minimum proof required to show concert of action. Here, Sharp has never contested the sufficiency of evidence supporting the jury finding of concerted agreement. Rather, Sharp contended only that the agreement found by the jury did not constitute price fixing. Second, unlike mere evidence of complaints followed by termination, an agreement to terminate because of price cutting, as specifically found by the jury below, is by definition entirely free of ambiguity on the question of collusion. Third, the instructions below required the jury to determine, not merely whether Hartwell complained and Sharp terminated, but whether the

termination was done "pursuant to an agreement . . . to eliminate price cutting by [BEC] . . . ." Tr. 1587. Fourth, the evidence in this case of an agreement to terminate because of price cutting was far greater than mere evidence of termination in response to dealer complaints. The Fifth Circuit itself said:

> There is evidence that, even before Hartwell became a dealer, Sharp sought BEC's adherence to the suggested retail price list. BEC produced evidence tending to show that it was not "free-riding" and that its sales performance was equal to Hartwell's. The logical inferences from such evidence, if drawn by the jury, could support a finding that BEC's termination was not due to the reasons Sharp suggests. . . .
>
> In addition, there was evidence that Hartwell usually followed Sharp's suggested prices. There was also evidence that Hartwell sought to encourage BEC to follow these prices. Finally, the record shows that Hartwell complained vigorously to Sharp about BEC's pricing and that ultimately Sharp responded by terminating BEC. This evidence, taken as a whole and viewed in the light most favorable to BEC, could support an inference that Sharp and Hartwell had agreed that Hartwell would follow Sharp's suggested retail prices and that BEC's termination was pursuant to this agreement.

780 F.2d at 1219. This evidence, along with Hartwell's express demand that Sharp terminate BEC for price cutting, satisfies the *Monsanto* requirement of "evidence which tends to exclude the possibility that the manufacture and non-terminated distributor were acting independently," and removes this case from the mere "termination-in-response-to-complaints" category. The only issue

here is whether an agreement to eliminate price cutting is different *in substance* from a "price maintenance agreement." They are the same, and to hold otherwise is to glorify semantics and ignore the substance of the agreement at issue.

4. The Decision Below Contravenes Congressional Intent.

Congress recently passed legislation that implicitly rejects the holding below. See Pub. L. 99-180 at § 605, 99 Stat. 1136, 1169-70 (Dec. 13, 1985). As a prelude to this legislation, the House of Representatives issued House Report 99-399 on November 21, 1985. H.R. 99-399, which stongly criticizes the so-called "Vertical Restraints Guidelines" published by the Department of Justice in January 1985,* says in part:

> Other "restatements" of the law exist in the Guidelines that attempt to dilute or trivialize the generality of the per se rule against price fixing, both horizontal and vertical. *The Division claims,* again without accompanying authorities, *that vertical price fixing is lawful so long as the agreement to fix prices does not set "specific" resale prices* and is ancillary to one or more non-price restraints. . . . Such a statement appears to reject or ignore any consideration of the effects of a restraint on price in determining whether there is a price fixing agreement.
>
> * * * * *
>
> In all these respects, the Guidelines are *inconsistent with existing law* and are also demonstrably *unsound as a matter of policy*.

* Sharp expressly relied on these Guidelines in its brief filed in the Fifth Circuit below.

(Emphasis added). This Report led to Congressional enactment of § 605 of Pub. L. 99-180 which reads in pertinent part:

> Whereas such ["Vertical Restraint Guidelines" published by the Justice Department] are inconsistent with established antitrust law . . . in stating that vertical restraints that have an impact upon prices are subject to the per se rule of illegality only if there is an *'explicit agreement as to the specific prices'* . . . ;
>
> * * * * *
>
> . . . Now, therefore, be it
>
> *Resolved,* That it is the sense of the Congress that the antitrust enforcement policy guidelines stated in "Vertical Restraints Guidelines" . . .
>
> are *not an accurate expression of the Federal antitrust laws or congressional intent with regard to the application of such laws to resale price maintenance.* . . .

99 Stat. at 1169-70 (emphasis added in part).

This statement of Congressional intent pinpoints the critical flaw in the decision below: the notion that the per se rule against price fixing narrowly applies only to direct agreements on resale price levels. The Congress recognized that, in substance, both concerted elimination of price cutting and direct agreement on price are forms of price fixing having the same illicit purpose and effect.

CONCLUSION

This Court observed only a few weeks ago:

> . . . [C]utting price in order to increase business often is the very essence of competition.

Matsushita Electric Industrial Co. v. Zenith Radio Corp., No. 83-2004, slip op. at 19 (U.S. March 26, 1986). By holding that a conspiracy to eliminate price competition does not amount to unlawful price fixing, the Fifth Circuit struck a blow to the heart of federal antitrust policy—the preservation of price competition. If the decision below is allowed to stand, manufacturers in the Fifth Circuit may obtain from their dealers an agreement not to compete on price without fear of per se liability.

For the reasons stated above, a writ of certiorari should be issued to review this erroneous evisceration of the doctrine against price fixing.

Respectfully submitted,

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Dated: May 20, 1986.

CERTIFICATE OF SERVICE

This is to certify that three true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit by Petitioner Business Electronics Corporation were served by mail on counsel of record for Respondent on the 20th day of May, 1986.

_____
GARY V. MCGOWAN

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 84-2618

BUSINESS ELECTRONICS CORPORATION,
Plaintiff-Appellee,

v.

SHARP ELECTRONICS CORPORATION,
Defendant-Appellant.

(Filed January 21, 1986)

OPINION

Before: Charles Clark, Chief Judge, Homer Thornberry, and Edith H. Jones, Circuit Judges.

Opinion by Judge Charles Clark;
Concurrence by Judge Edith H. Jones

Appeal from the United States District Court
for the Southern District of Texas

Woodrow Seals, Senior District Judge, Presiding

SUMMARY

Antitrust/Evidence

Appeal from verdict in favor of Business Electronics Corporation (BEC). Reversed and remanded.

BEC was Sharp Electronics Corporation's (Sharp's) sole electronic calculator dealer in the Houston area.

BEC often sold Sharp's products below the retail list price. Sharp became dissatisfied with BEC and appointed Hartwell as a dealer in the same area. Hartwell complained about BEC's pricing policies and eventually told Sharp that either BEC must be terminated or he would terminate his Sharp dealership. Sharp terminated BEC. BEC sued under the Sherman Act and the case was submitted to the jury on the theory that an agreement between Sharp and Hartwell to terminate BEC because of the latter's price cutting constitutes a per se violation of section one of the Sherman Act.

[1] It was not enough for the jury to find that BEC was terminated to reduce price competition; the jury should have been required to find that the termination was pursuant to a price maintenance agreement between Sharp and Hartwell. [2] It is recognized that this conflicts with the rule followed by other circuits that if a manufacturer deliberately withdraws its product from a price-cutting distributor at the request of a competing distributor as part of a conspiracy to protect the requesting distributor from price competition, the manufacturer has committed a per se violation of the antitrust laws. [3] That rule is not adopted in the Fifth Circuit. Any vertical non-price restriction may affect resale prices, yet the Supreme Court has held such restrictions are nonetheless to be evaluated under the rule of reason. [4] This position is supported by *Monsanto Co. v. Spray-Rite Service Corp.*, ____U.S.____, 104 S. Ct. 1464, ____L.Ed.2d____, *reh'g denied*, 104 S. Ct. 2378 (1984) which drew distinctions between concerted and independent action (only the former is proscribed by the Sherman Act) and [5] between concerted action to set prices and concerted action on non-price restrictions (the former is illegal per se

while the latter is evaluated under the rule of reason). [6] It is possible to interpret *Monsanto* as saying merely that a manufacturer can terminate a price cutter whether or not a complaining dealer "agrees" as long as the manufacturer is acting for some reason other than just knuckling under to the complaining dealer's desire for less competition. However, this would lead to the very "irrational dislocations" *Monsanto* sought to avoid. [7] In order for a manufacturer's termination of a distributor to be illegal per se, it must be pursuant to a price maintenance agreement with another distributor. The jury instructions in this case failed to reflect this standard and were, therefore, critically defective.

[8] To grant the relief requested by Sharp, reversal of the denial of its motions for directed verdict and for judgment notwithstanding the verdict and dismissal of the complaint, it is necessary to determine that the evidence is such that reasonable men could arrive at only one verdict. [9] However, the evidence was sufficient to support a properly directed jury verdict in BEC's favor.

[10] A document Sharp sought to introduce should not have been excluded on hearsay grounds. Sharp was not offering the document to prove the truth of the statements therein. It was offered to show Sharp believed BEC had only made 45% of its sales quota. [11] Likewise, documents received by Sharp's Texas representative setting quotas and emphasizing the importance of meeting quotas were admissible to show the representative was under pressure to meet quotas.

[12] An antitrust plaintiff is not required to prove with exact particularity what its success might have been in the market absent the illegal conduct of another. There-

fore, Hartwell's sales could have been used as a yardstick to measure BEC's damages as he sold the same product in the same area.

The concurrence stated that this case perfectly illustrates the argument why vertical price restraints should be tested under anti-trust's rule of reason rather than, as *Monsanto* continues to require, per se illegality.

OPINION

CHARLES CLARK, Chief Judge:

Defendant-appellant Sharp Electronics Corporation (Sharp) appeals from a jury verdict in favor of plaintiff-appellee Business Electronics Corporation (BEC), a former dealer in Sharp calculators, on BEC's claim that Sharp committed a *per se* violation of section one of the Sherman Act by agreeing with a competing dealer to terminate BEC because of its price cutting. Sharp contends that (1) the district court erred in instructing that it must find *per se* liability without regard to any agreement on price, (2) the evidence was insufficient to support a jury finding of *per se* liability, (3) there should be no rule of *per se* liability in vertical price fixing cases, (4) the district court committed prejudicial error in making certain evidentiary rulings and (5) the district court accepted an erroneous measure of damages. Because the jury was improperly instructed on point (1), we reverse and remand for a new trial.

I

Sharp is a supplier of various consumer and business products, including electronic calculators, throughout the

United States. Sharp distributed its calculators through a network of retail dealers that bought the calculators from Sharp and resold them to end users. Sharp provided retail price lists which suggested resale prices to its dealers.

In 1968, Sharp appointed Kelton Ehrensberger as its sole electronic calculator dealer in the Houston area. Ehrensberger later incorporated as BEC and continued his dealership under that name. BEC's sales strategy involved keeping retail prices low and BEC often sold at prices lower than those on Sharp's retail price lists.

It is apparent that, several years after Ehrensberger became a Sharp calculator dealer, Sharp became dissatisfied with BEC's performance. The parties disagree, however, on the reason for Sharp's dissatisfaction. Sharp presented evidence that BEC failed to meet sales quotas and that Sharp remonstrated with it for this poor sales performance. BEC, on the other hand, presented evidence that Sharp was concerned about BEC's discounting and wanted BEC to "clean up [its] pricing structure."

In mid-1972, Sharp's problem with BEC led to the appointment of Gilbert Hartwell as a Sharp calculator dealer in the Houston area. The record indicates that Sharp may have initially promised Hartwell that his dealership would be exclusive, but Sharp subsequently decided to retain BEC until more was learned about the market.

Hartwell was very upset about BEC's pricing policies and suggested to Ehrensberger that the dealers avoid a "discount" situation. He also complained bitterly to Sharp that BEC was undercutting him in the market. There was evidence that Sharp shared Hartwell's concern, although Hartwell testified that Sharp consistently told him that

it could not tell BEC what prices to charge. Hartwell also testified that he was not concerned about BEC's price cutting in general but only about BEC's "free riding" on Hartwell's investment in product promotion and other sales-related services. He stated that the customers which he developed through these means would then buy from BEC at lower prices.

In June, 1973, Hartwell presented an ultimatum to Sharp—unless Sharp terminated BEC within 30 days, Hartwell would terminate his own Sharp dealership. Sharp responded by terminating BEC.

The evidence showed that Hartwell usually, but not always, adhered to Sharp's suggested retail prices. According to Hartwell's testimony, he was under no obligation to sell at any particular price. The prices of Sharp calculators have dropped since 1973.

II

The district court submitted this case to the jury on the theory that an agreement between Sharp and Hartwell to terminate BEC because of the latter's price cutting constitutes a *per se* violation of section one of the Sherman Act. The district court charged the jury:

> The Sherman Act is violated when a seller enters into an agreement or understanding with one of its dealers to terminate another dealer because of the other dealer's price cutting. Plaintiff contends that Sharp terminated Business Electronics in furtherance of Hartwell's desire to eliminate Business Electronics as a price-cutting rival.

The court also submitted a special interrogatory to the jury, which it described as follows:

> Question number 1 asks you whether you find by a preponderance of the evidence that there was an agreement or understanding between Sharp and Hartwell to terminate Business Electronics as a Sharp dealer because of Business Electronics' price-cutting.

This theory, which does not require an agreement between Sharp and Hartwell to maintain resale prices, is an incorrect one. This court's decision in *Aladdin Oil Co. v. Texaco, Inc.*, 603 F.2d 1107 (5th Cir. 1979), demonstrates both the error committed in this case and the proper standard of liability. In *Aladdin Oil,* the plaintiff sought to acquire the assets of a Texaco distributorship which was going out of business. However, defendant Texaco, the supplier of oil and gasoline products, consulted with defendant Powertram, the other Texaco distributor in the area, and decided that Texaco did not need two distributors in the same area. Therefore, Texaco, which had an option to purchase the failing distributorship, decided to assign its option to Powertram and prevent the plaintiff from acquiring a distributorship in competition with Powertram. This court held that this conduct alone did not violate the antitrust laws. The fact that plaintiff alleged that Texaco and Powertram had prevented it from acquiring a distributorship in order to lessen intrabrand competition made no difference because "abstract lessening of intrabrand competition is not enough." *Id.* at 1116. The court indicated, however, that had Texaco's action been taken pursuant to a price maintenance agreement with Powertram, it would have violated the antitrust laws. *Id.* at 1117.

[1] Similarly, in the present case it was not enough for the jury to find that BEC was terminated to reduce price competition; the jury should have been required to

find that the termination was pursuant to a price maintenance agreement between Sharp and Hartwell. *St. Petersburg Yacht Charters, Inc. v. Morgan Yacht, Inc.*, 457 So.2d 1028, 1050 (Fla. Dist. Ct. App. 1984); *see also Borger v. Yamaha Int'l Corp.*, 625 F.2d 390, 397 (2d Cir. 1980) (improper for jury instructions to state that a dealer termination was unlawful "solely on the basis of a purpose to restrict intrabrand competition"). Additional support for this proposition may be found in *Muenster Butane, Inc. v. Stewart Co.*, 651 F.2d 292, 294-95 (5th Cir. 1981), where the court treated the termination of a dealer, apparently to protect another dealer from "intense competitive pricing," as a vertical non-price restraint to be tested under the rule of reason. *See also Joe Regueira, Inc. v. American Distilling Co., Inc.*, 642 F.2d 826, 833 (5th Cir. 1981) (plaintiff was required to show that its termination "was the result of a combination . . .which had as its purpose or effect the *fixing* of wholesale and retail prices") (emphasis added). An example of the type of instruction that would have been proper in this case may be found in *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 428 n.14 (5th Cir. 1985).

[2] We recognize that the standard of liability we set forth conflicts with the rule enunciated in *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 170 (3d Cir. 1979) and followed by a number of other circuits. *E.g., Victorian House, Inc. v. Fisher Camuto Corp.*, 1985-2 Trade Cases ¶ 66,706 at 63,382 (8th Cir. July 18, 1985); *Zidell Exploration, Inc. v. Conval Int'l, Ltd.*, 719 F.2d 1465, 1469 (9th Cir. 1983); *Bostick Oil Co. v. Michelin Tire Corp.*, 702 F.2d 1207, 1215 (4th Cir.), *cert. denied*, ____U.S.____, 104 S. Ct. 242 (1983). The *Cernuto* rule is that "if a manufacturer deliberately withdraws its product from a price-cutting distributor at the request of a competing distributor as part of a conspiracy to protect the requesting distributor from price competition, the manufacturer has committed a per se violation of the antitrust laws." *Zidell, supra,* 719 F.2d at 1469. The courts following this rule reason that if the manufacturer and dealer wish to protect the dealer from price competition then they must intend that prices be higher once the price-cutting dealer is terminated.

[3] This circuit has not adopted this reasoning. *See St. Petersburg Yacht Charters, supra,* 457 So.2d at 1048-49 (citing *Muenster Butane, Inc., supra,* 651 F.2d at 294-95). An agreement to terminate a price cutter does not fix prices at any specific or general level but merely frees the complaining dealer to set prices as he chooses. *St. Petersburg Yacht Charters, supra,* 457 So.2d at 1043-45. It is true that the effect of terminating the price cutter may be to raise prices but this is equally true of the granting of an exclusive dealership, which we have held not to be *per se* illegal. *Carlson Machine Tools, Inc. v. American Tool, Inc.*, 678 F.2d 1253, 1259 (5th Cir. 1982) (the grant of an exclusive dealership is not a *per se* violation of the Sherman Act because "such a grant does not seek to impose resale price maintenance on the distributor"). Any vertical non-price restriction may affect resale prices, yet the Supreme Court has held that such restrictions are nonetheless to be evaluated under the rule of reason. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 57, 97 S. Ct. 2549, 2561, 53 L.Ed.2d 568, 584 (1977).

[4] The Supreme Court's recent decision in *Monsanto Co. v. Spray-Rite Service Corp.*, ____U.S.____, 104 S.Ct.

1464, ____L.Ed.2d____, *reh'g denied,* 104 S. Ct. 2378 (1984), further confirms that this circuit's divergence from the *Cernuto* rationale is correct. In *Monsanto,* the Court held that an antitrust plaintiff cannot survive a directed verdict motion merely by showing a manufacturer terminated a price-cutting distributor in response to or following complaints by other distributors. *Id.* at ____, 104 S. Ct. at 1468. The Court noted two important distinctions in distributor-termination cases. The first is the distinction between concerted and independent action—only the former is proscribed by the Sherman Act. *Id.* at ____, 104 S. Ct. at 1469. Thus, under *United States v. Colgate & Co.,* 250 U.S. 300, 307, 39 S. Ct. 465, 468, 63 L.Ed. 992 (1919), it is permissible for a manufacturer, acting independently, to terminate any distributor for its failure to comply with the manufacturer's suggested retail prices.

[5] The second distinction is between concerted action to set prices and concerted action on non-price restriction—the former is illegal *per se* while the latter is evaluated under the rule of reason. *Id.* at ____, 104 S. Ct. at 1469. The Court conceded that these distinctions are difficult to apply in practice because both the conduct of the parties and the economic effect of that conduct may be similar or identical in many cases. *Id.* at ____, 104 S. Ct. at 1470. However, in *Monsanto* the Court chose not to deal with the underlying theoretical difficulties of the *per se* rule[1] Instead, the Court sought to

1. The validity of distinction between vertical price restraints and non-price restraints has been the subject of scholarly discussion. *See e.g.,* Bork, Vertical Restraints: Schwinn Overruled, 1977 Sup. Ct. Rev. 171, 180-81 (1977); Posner, The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision, 45 U. Chi. L. Rev. 1, 7-8 (1977). Posner, The Next Step in the Anti-trust Treatment of Restricted Distribution: Per Se Legality, 48 U. Chi. L. Rev. 6, 9 (1981).

Sharp urges us to evaluate all vertical restraints under the rule of reason. This argument faces a long history of the application of the *per se* rule against vertical price restraints. *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373, 31 S. Ct. 376, 55 L.Ed. 502 (1911). Our resolution of this case makes it unnecessary for us to reach or rule on Sharp's contention.

ensure that legitimate conduct on the part of the manufacturers and distributors would not be penalized due to the ambiguity of the legal rule. It is perfectly legitimate, and expected, for distributors to complain about the price cutting of their rivals. It is also legitimate for a manufacturer to terminate a price cutter either independently or pursuant to a non-price agreement. The mere fact that a manufacturer terminates a price cutter folowing or in response to dealer complaints does not determine whether the manufacturer is acting independently, pursuant to a non-price agreement or pursuant to a price agreement. To allow evidence of termination following or in response to complaints to serve as the sole basis for the award of treble damages to the terminated dealer would tend to discourage legitimate dealer complaints and legitimate manufacturer action in the face of such complaints. By disrupting communications between manufacturer and dealer it would create "an irrational dislocation in the market." *Id.* at ____, 104 S. Ct. at 1470.

[6] It is possible to interpret *Monsanto* as saying merely that a manufacturer can terminate a price cutter, whether or not a complaining dealer "agrees," as long as the manufacturer is acting for some reason other than "just knuckling under to the [complaining dealer's] desire for less

competition." *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 744 (7th Cir. 1982). Such an interpretation could make *Monsanto* consistent with *Cernuto*. *Id.; see also Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 101 S. Ct. 1981 (1981). However, this interpretation would lead to the very "irrational dislocations" that *Monsanto* sought to avoid. The jury, under *Cernuto*, is required to determine whether the manufacturer's motivation was one of terminating "free riders" or one of reducing price competition, yet in either case the manufacturer's attitude will be one of hostility toward price cutters. As Judge Posner has put it, there is a "certain unreality" in trying to tell these motivations apart. *Valley Liquors, supra*, 678 F.2d at 744. Therefore, the manufacturer which desires to terminate a price cutter because of its free riding will be deterred from this legitimate action because it is indistinguishable, except perhaps to a mind reader, from what *Cernuto* prohibits, i.e., termination of a price cutter because of its price cutting.

The instant case well illustrates the problem. If, confronted with Hartwell's complaints, Sharp determined that BEC's price cutting was undermining Hartwell's incentive to promote Sharp calculators (or simply that it was preferable to terminate BEC because of its poor sales record), Sharp had a perfect right to terminate BEC. Sharp's legal counsel, however, would be unable to advise Sharp of a means of safely accomplishing termination if, as under *Cernuto*, Sharp's antitrust liability turned solely on a jury's guess as to Sharp's motivation. Thus, Sharp would be prevented from exercising its legal rights merely because its information originated in a dealer complaint,

the very "irrational dislocation" *Monsanto* sought to prevent.[2]

Monsanto did not expressly disapprove the *Cernuto* rule. Indeed, the Court cited, in support of its holding, cases such as *Sweeney, supra*, which follow *Cernuto*. However, the issue in *Monsanto* was the quantity of evidence necessary to infer a price fixing agreement, not whether it was necessary to show such an agreement at all. Nothing in *Monsanto* suggests that liability can be found without any evidence of a price fixing agreement. Rather, the language of *Monsanto* can only indicate the Court's belief that a price fixing agreement is a requirement for *per se* liability in distributor-termination cases. For example, the Court indicated that a plaintiff must show that the "distributors are not making independent pricing decisions." *Monsanto, supra*, ____U S. at ____, 104 S. Ct. at 1470. The Court also stated that "it is of considerable importance that independent action by the manufacturer, and concerted action on nonprice restrictions, be distinguished from price-fixing agreements, since under present law the latter are subject to per se treatment and treble damages." *Id.* Finally, the Court defined the concept of "common scheme" as including communication between the parties as to an agreement on price. *Id.* at ____, 104 S. Ct. at 1471 n.9.

[7] For these reasons we hold that, in order for a manufacturer's termination of a distributor to be illegal

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2. [D]ealer complaining is likely whenever there is discounting by free riders, because most dealers are harmed by such conduct. The manufacturers cannot prevent the complaining. Yet if it occurs the manufacturer may have to abandon even nonprice restrictions in distribution, because any action it takes against a discounter may be deemed to be tainted by price-fixing. Posner, The Next Step, *supra* note 1, at 13.

per se, it must be pursuant to a price maintenance agreement with another distributor. That distributor must expressly or impliedly agree to set its prices at some level, though not a specific one. The distributor cannot retain complete freedom to set whatever price it chooses. The jury instructions in this case failed to reflect this standard and therefore were critically defective.[3]

III

Sharp contends that the evidence is insufficient to raise a jury issue as to whether Sharp and Hartwell entered into a price maintenance agreement. Sharp therefore argues that we should reverse the district court's denial of its motions for directed verdict and for judgment notwithstanding the verdict and order BEC's complaint dismissed.

[8] When a party moves for a judgment as a matter of law, the court should consider the evidence "in the light and with all reasonable inferences most favorable to the party opposed to the motion." *Boeing Co. v. Shipman,* 411 F.2d 365, 374 (5th Cir. 1969). A court may only take a case from the jury if the evidence is such that reasonable men could arrive at only one verdict. *Id.* To grant the relief sought by Sharp, we should also test the proof in terms of a fact finder operating under the proper legal concepts articulated in Part II above.

[9] Applying this standard to the case at bar, we hold that the evidence was sufficient to support a properly

3. If, on retrial, the district court again chooses to use special interrogatories, it may wish to follow either the form of the first interrogatory in *Monsanto,* __U.S.__ n.2, 104 S. Ct. 1467, n.2 or the bifurcated form of the first and second interrogatories in *Pierce v. Ramsey Winch,* 753 F.2d at 422, 423 n.6.

instructed jury verdict in BEC's favor. While it is true that there was little, if any, direct evidence that Sharp and Hartwell reached an agreement as to price, we think the jury reasonably could infer such an agreement from the evidence as a whole.

There was evidence that, even before Hartwell became a dealer, Sharp sought BEC's adherence to the suggested retail price list. BEC produced evidence tending to show that it was not "free-riding" and that its sales performance was equal to Hartwell's. The logical inferences from such evidence, if drawn by the jury, could support a finding that BEC's termination was not due to the reasons Sharp suggests. *See Fragale & Sons Beverage Co. v. Dill,* 760 F.2d 469, 474 (3d Cir. 1985).

In addition, there was evidence that Hartwell usually followed Sharp's suggested prices. There was also evidence that Hartwell sought to encourage BEC to follow these prices. Finally, the record shows that Hartwell complained vigorously to Sharp about BEC's pricing and that ultimately Sharp responded by terminating BEC. This evidence, taken as a whole and viewed in the light most favorable to BEC, could support an inference that Sharp and Hartwell had agreed that Hartwell would follow Sharp's suggested retail prices and that BEC's termination was pursuant to this agreement.

For these reasons Sharp was not entitled to judgment as a matter of law.

IV

The critical error in the jury instructions alone requires reversal. Two further issues should be addressed because they are likely to arise on retrial. The first issue involves

an evidentiary ruling. At trial, Sharp sought to introduce certain documents to confirm its policy of terminating dealers who failed to meet sales quotas. Defendant's Exhibit 52 is a Sharp document sent to Sharp Vice-President H. Kawai, one of the men responsible for BEC's termination, in May 1972. The document indicates that BEC made only 45% of its sales quota. Defendant's Exhibit 53 is a Sharp document sent to sales representatives and managers, as well as Kawai, in May, 1972; it states that dealers who fall below 50% quota should be replaced.

[10] Sharp contends that the district court erroneously excluded these documents as hearsay. We agree. " 'Hearsay' is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801 (c). Sharp was not offering these documents for the purpose of proving the truth of the statements contained therein. Defendant's Exhibit 52 was not offered to show that BEC had only made 45% of its quota but to show Sharp *believed* BEC had only made 45% of its quota. *See Moore v. Sears, Roebuck & Co.*, 683 F.2d 1321, 1322 (11th Cir. 1982) (corporate memoranda concerning employee's performance were admissible, not to show that employee actually performed poorly, but to show that corporation believed that employee's performance was poor). Defendant's Exhibit 53 was offered to show that Kawai, who *received* the document, believed that Sharp's policy was to terminate dealers who fell below 50% of quota, whether or not this was in fact Sharp's policy.

Exhibit 53 would also be admissible for the purpose of showing what Sharp's policy actually was because it did not directly declare that "termination is Sharp's policy"

but merely indicated that policy indirectly by saying that dealers falling below 50% of quota should be replaced. *See* McCormick, *Evidence* § 249. Even if hearsay, the document would fall within the "state of mind" exception. Fed. R. Evid. 803(3).

The district court's memorandum and order indicated that even if the excluded documents were admissible, they related to policies and states of mind "too far removed in time from the termination to be relevant." Although the district court has broad discretion in the admission of evidence, *Carlton v. Shelton*, 722 F.2d 203, 206 (5th Cir.), *cert. denied*, 104 S. Ct. 2389 (1984), that discretion was improperly exercised here. Much of the evidence BEC relies upon relates to Sharp's actions long before the termination. Indeed, the district court properly admitted Plaintiff's Exhibit 6, a Sharp document from February 1971, which reflected Sharp's policy at that time of enforcing minimum retail pricing on another product line. Exhibits 52 and 53 provide explanations for Sharp's actions other than a pure concern for BEC's pricing. Furthermore, the fact that Sharp believed in 1972 that BEC had only met 45% of its quota is relevant to its decision to terminate BEC, when faced with an ultimatum from a more successful dealer, one year later. It was error to exclude Defendant's Exhibits 52 and 53.

[11] Defendant's Exhibits 54 and 55 are Sharp documents that were received by Thomas Burkholder, Sharp's Texas representative, in May and September, 1972. They set Burkholder's sales quota and indicate the importance of meeting that quota. Exhibits 54 and 55 were also improperly excluded as hearsay. They were offered to show their effect on Burkholder, *i.e.*, to show that he was under pressure to meet sales quotas. The district court

correctly ruled that Defendant's Exhibits 54 and 55, which did not relate to dealer performance or quotas, were not sufficiently relevant to be admissible.

V

The second issue involves Sharp's contention that the district court accepted an erroneous method of computing damages. First, Sharp claims that Hartwell's sales should not have been used as a yardstick to measure BEC's damages. Second Sharp argues that the plaintiff's damage expert improperly used BEC's gross profit margin, instead of Hartwell's lower gross profit margin, to calculate damages.

[12] An antitrust plaintiff is not required to "prove with exact particularity what its success might have been in the market in the absence of illegal conduct of another." *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980. 995 (5th Cir. 1983), *cert. denied,* 104 S. Ct. 1594 (1984). The use of Hartwell as a yardstick was reasonable because he sold the same product in the same area. He sold to similar customers. While both were in business, their sales volume was roughly equivalent. Furthermore, there was evidence that BEC's expenses were lower than those of Hartwell. Although Sharp pointed to possible defects in the method used by BEC, consideration of such defects was properly left to the jury since the method chosen was not a matter of pure speculation. *Pierce v. Ramsey Winch, supra,* 753 F.2d at 440. We conclude that the district court did not err in accepting BEC's method of calculation damages.

VI

The district court correctly ruled that Sharp was not entitled to a judgment as a matter of law. We reverse the

judgment appealed from because the case was submitted to the jury on an erroneous theory of liability. We remand for further proceedings not inconsistent with this opinion. REVERSED AND REMANDED.

JONES, Circuit Judge, concurring:

I concur in the judgment requiring remand for retrial because this court is bound by the decision in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S. Ct. 1464, 79 L.Ed.2d 775 (1984). However, I believe this case perfectly illustrates the arguments why vertical price restraints should be tested under antitrust's Rule of Reason[1] rather than, as *Monsanto* continues to require, per se illegality. There is no social benefit to subjecting manufacturers' pricing relationships with their distributors to potential per se illegality where they operate in markets whose interbrand competitiveness overwhelms any detrimental effects of those relationships. And, although *Monsanto* moves toward alleviating the threat of unwarranted treble-damage action, the abiding uncertainty suggests that the Supreme Court would more wisely jettison the precedent that led to the rule of per se illegality for vertical price restraints.

The flaws in *Monsanto's* continued recognition of per se illegality are highlighted by this case. First, it is difficult to conceive how, in the real world, the subjection of vertical price restraints to per se illegality improves the functioning of the economy or enhances consumer welfare. Only atavistic devotees of the abacus or slide rule could fail to recall the remarkable history of the electronic

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1. *See Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S. Ct. 2549, 53 L.Ed.2d 568 (1977).

calculator market during the last fifteen years. The range of available models, variety of functions that can be performed, and myriad optional enhancements have multiplied rapidly while the average prices have plummeted. The number of competing manufacturers has increased. To maintain their market position and profitability, manufacturers like Sharp have obviously been required to react quickly and imaginatively to changes in the marketplace. The record in this case reveals that both Sharp's market share and the retail prices of its calculators were declining in this period.[2] Nevertheless, as the result of the current state of antitrust law, Sharp is potentially held accountable in treble damages for terminating a distributor who, in Sharp's perception, failed to market its product adequately. To hold, as this court must, that Sharp cannot respond to changing market conditions with all of the competitive arrows in its quiver including, if necessary, a program to respond to "free riders" like BEC,[3] is to put Sharp at a potential competitive disadvantage. To limit Sharp's marketing options for its calculators may also limit the range of products available to the consumer of calculators. See Easterbrook, *Vertical Arrangements and the Rule of Reason,* 53 Antitrust L.J. 135 (1984). To isolate one factor in the relationship of Sharp and its distributors, i.e. whether Sharp required them to adhere to its published retail price lists, in this

2. Sharp faced 100 competitors. The prices of its calculators ranged from $500-1,000 in 1972 to $150-300 ten years later.

3. "Free riders" are distributors who market products by cutting their prices, to the neglect of customer and market-development services, which are performed by the distributor who has kept margins higher by not discounting. Frequently, the "free rider's" sales benefit from the services performed by the full-price dealer. *See* Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision,* 45 U. Chi. L. Rev. 1, 6-10 (1977).

hectically competitive market is to ignore the fact that here have been no anticompetitive effects of the conduct in issue: prices declined and the number and quality of competing products increased. The larger conclusion that can be drawn from the scenario of this case is that assuming the continued variety, vitality and innovation of the American free enterprise system, it is unrealistic to conclude that measures taken by a manufacturer to enhance his product's marketability, whether related to price or not, are anticompetitive unless they are part of a program to enforce a manufacturer- or dealer-level cartel. *See* Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality,* 48 U. Chi. L. Rev. 6, 25 (1981).

As the majority opinion elegantly demonstrates, *Monsanto* has raised the level of proof required to submit a vertical price restraint case to the jury. However, its second flaw is that, despite so doing, it leaves a cloud of uncertainty and incongruity. The *Monsanto* standard, a "something more" formulation of a vertical price agreement,[4] provides little guidance for lower courts and counsel. Already, the Eighth Circuit has affirmed a finding of per se liability based upon a "price-related" conspiracy, which is totally at odds with today's interpretation on *Monsanto* by this Circuit. *See Victorian House Inc. v. Fisher Camuto Corp.,* 769 F.2d 466, 469 (8th Cir. 1985); *compare Bender v. Southland Corp.,* 749 F.2d 1205 (6th Cir. 1984). Most clever attorneys, like plaintiff's counsel in this case, will be able to generate sufficient evidence, even pursuant to the *Monsanto* stand-

4. 104 S. Ct. at 1471 n.9 ("evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer").

ard, to withstand summary judgment review, and thus to exert substantial influence toward settlement of cases where no anticompetitive harm, or harm to the consuming public, really occurred. Moreover, the distinction between vertical price and non-price restraints can be difficult to draw, and because *Monsanto* retains a powerful incentive to describe a dealer's anti-trust complaints as being price-related, in order to secure the litigational benefit of the per se standard, such distinctions can be expected to be even more finely (and uselessly) articulated. *See generally* Hay, *Vertical Restraints after Monsanto,* 70 Cornell L.Rev. 418, at 431-435 (1985). Retention of the per se test of illegality for vertical price-maintenance will thus continue to inhibit the functioning of non-price restraints which the Supreme Court sees as generally beneficial. *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 97 S. Ct. 2549, 53 L.Ed.2d 568 (1977). In sum, the antitrust law of vertical restraints remains much in turmoil, to the detriment of potential defendants and the public, which suffers due to the limitation of distributional variety, but to the benefit of the legal class.

Semantic nuances are costly to businessmen in the real world. The Supreme Court has noted that, "per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive. . . . 'there are certain agreements and practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.' " *Northern Pacific R. Co. v. United States,* 356 U.S. 1, 5, 78 S. Ct. 514, 518, 2 L.Ed.2d

545 (1958) (quoted in *Continental T.V., Inc. v. GTE Sylvania Inc., supra,* 433 U.S. at 50, 97 S. Ct. at 2557.[5] Present economic understandings does not compel per se treatment of vertical price restrictions. On the contrary, Judge Easterbrook's analysis of *Monsanto* would appear to be correct:

> If restricted dealing and price arrangement are ordinarily procompetitive, if there is no real difference between the effects of price and non-price restraints, and if the objection to [vertical price restraints] is the same as that to other vertical restraints, then it follows that per se condemnation of [vertical price restraints] is anomalous.

Easterbrook, supra at 171. The Supreme Court should take the earliest opportunity to review its Russian roulette approach to vertical price restraints.

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5. For a discussion of the quirky and questionable legal history of the per se rule in vertical price restraint cases, see Brief of the United States as Amicus Curiae to the Supreme Court in the *Monsanto* case; see also Easterbrook, *supra*.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-78-1020

BUSINESS ELECTRONICS CORPORATION, ET AL.,
Plaintiff

v.

SHARP ELECTRONICS CORPORATION, ET AL.,
Defendants.

MEMORANDUM AND ORDER

Presently pending before the Court is Defendant Sharp Electronic Corporation's (Sharp) Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, For a New Trial. Rules 50(b) and 59, Fed. R. Civ. P. The Court, having considered carefully the motion, together with the briefs submitted by the parties, the evidence adduced at trial and the relevant law, concludes that the motion must be denied.

This action was originally filed in the Western District of Texas on July 11, 1975, alleging violations of the Sherman and Clayton Anti-Trust Acts, 15 U.S.C. §§ 1-31. The case was subsequently transferred to this district on June 7, 1978. A jury trial was commenced on October 17, 1983, and special verdicts were returned on November 4, 1983. Final judgment was entered on the jury verdicts on December 7, 1983; this motion for post-judgment relief was timely filed on December 19, 1983.

JUDGMENT N.O.V.

The standard governing a decision to grant or deny a motion for judgment notwithstanding the verdict (judgment n.o.v.) is that set forth in *Boeing v. Shipman,* 411 F.2d 365 (5th Cir. 1969) (en banc):

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only where there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

Id. at 374-75 (footnote omitted). *See also Affiliated Capital Corp. v. City of Houston,* 735 F.2d 1555, 1563

(1984); *Languirand v. Hayden,* 717 F.2d 220, 228 (5th Cir. 1983); *Aero Inten. v. United States Fire Ins. Co.,* 713 F.2d 1106, 1109-10 (5th Cir. 1983).

In the motion for judgment n.o.v., Sharp argues that (1) there was insufficient evidence to prove that Sharp and Codefendant Hartwell entered into a retail price maintenance agreement or that Business Electronics Corp. (BEC) was terminated in furtherance of the alleged agreement and (2) termination of a dealer in order to eliminate intrabrand price competition for a competing dealer is a "rule of reason" rather than a *per se* offense under § 1 of the Sherman Act.

Initially, the Court must address the second of these contentions: that termination of a distributor in furtherance of an agreement to eliminate intrabrand price competition should be judged under the rule of reason standard, rather than that of the harsh *per se* one. Sharp analogizes such termination to the decision to grant to one distributor an exclusive territorial dealership, a decision —which Sharp correctly points out—judged under the rule of reason standard.

On December 5, 1983, the Supreme Court heard oral argument in the case of *Monsanto Co. v. Spray-Rite Service Corp.,* No. 82-914. Numerous *amici,* including the Solicitor General, argued that the economic effect of such a "contract, combination . . . or conspiracy" differs little from that which arises from agreements on non-price restrictions, and should therefore be judged by the same standard. *See generally* Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision,* 45 Chi.L.Rev. 1 (1977). The Court however, noting that neither party had raised this issue at trial or

at the appellate court, declined to reach the question. *Monsanto Co. v. Spray-Rite Service Corp.,* ____U.S.____, 104 S. Ct. 1464, 1469 & n.7 (1984).

In contrast to *Monsanto* however, Sharp repeatedly urged the Court, both before and during trial, that the standard applicable to dealer-termination cases such as this is the rule of reason. The Court rejected this position and instructed the jury on the *per se* standard. While it is true that *Monsanto* does not prohibit application of the rule of reason standard, neither does it mandate it. Moreover, the Court finds Justice Brennan's concurring opinion persuasive on this point. The *per se* interpretation has been extant for 73 years, and Congress in that time has not seen fit to disturb that interpretation. *Monsanto,* 104 S. Ct. at 1473 (Brennan, J., concurring). Without a clear mandate to the contrary, this Court likewise declines. Accordingly, there was no error in the application of the *per se* standard to Sharp's conduct. *Cf. Northern Pac. R. Co. v. United States,* 356 U.S. 1, 5 (1958).

In *Monsanto,* the Court addressed the standard of proof governing sufficiency of evidence in a dealer-termination case where termination was allegedly in response to intraband price-cutting. Section 1 of the Sherman Act specifically requires a conspiracy or combination between a manufacturer and its distributors to reach conduct proscribed by the Act. Unilateral action by the manufacturer is not sufficient. Moreover, to be judged under the *per se* standard, such combination or conspiracy must constitute concerted action to set prices, and not merely concerted action on other non-price restrictions. The Court noted homever, that an attempt to differentiate between these two extremes solely by assessing the "market impact" of the complained of conduct, *Continental T.V., Inc. v. GTE*

Sylvania Inc., 433 U.S. 36, 51 (1977), was in practice extremely difficult. In many cases, "the economic effect . . . of the conduct described . . . [would be] similar or identical." *Monsanto,* 104 S. Ct. at 1470. The danger of the "market impact" approach, recognized by the Court, was that the jury might infer the existence of a concerted price-fixing agreement from "highly ambiguous evidence", thus subjecting the defendant to the *per se* standard and its concomitant treble damages.

Accordingly, in order to carry the burden of proving the existence of a price-setting agreement, plaintiff must show something more than the existence of price-cutting complaints by co-distributors, or even that plaintiff's termination followed such complaints. *Id.* The plaintiff must produce "evidence that tends to exclude the possibility that the manufacturer and non-terminated distributor were acting independently." *Id.* at 1471.

In the instant case, that distributor complaints were made and that BEC's termination followed is not seriously contested. Sharp does vigorously maintain that there is insufficient evidence to link these two events into a conspiracy. The Court does not agree. Sharp published and disseminated a retail price list to its dealers. This price list was closely followed by "letters" from Sharp to its dealers. When BEC failed to adhere to these suggested retail prices, Defendant Hartwell complained vocifierously to Sharp. Hartwell's outcry eventually escalated beyond mere complaints to an "either-or" ultimatum. Sharp terminated BEC immediately thereafter. Applying the *Boeing* and *Monsanto* standards to these and the totality of the facts of the case, the Court finds there was sufficient evidence for the jury to have concluded that Sharp and Hartwell were parties to an agreement to set product

retail prices and, in furtherance of that agreement, that BEC was terminated for refusing to adhere to those prices. *Monsanto,* 104 S. Ct. at 1471 & n.10.

In its motion for judgment n.o.v., Sharp also contends that there was insufficient evidence to support the jury damage award. While it is true that BEC must carry the burden of demonstrating a "rational quantum of actual damages" stemming from the anti-trust violations, that burden is somewhat lighter than that required to prove the initial fact of damages. This Circuit has consistently held that the plaintiff will not be required to "prove with exact particularity what its success might have been in the market in the absence of illegal conduct of another." *Multiflex, Inc. v. Samuel Moore & Co.,* 709 F.2d 980, 995 (5th Cir. 1983) (citing cases), *cert. denied,* ____ U.S.____, 104 S. Ct. 1594 (1984).

The Court notes that the arguments advanced here are essentially those which Sharp presented to the jury during trial. Both sides then availed themselves of expert testimony on these points. The economic model presented by Plaintiff's expert, Mr. Chernow, was ably attacked at that time. The jury was entitled to weigh and evaluate the opposing testimony, and the Court will not now invade the traditional province of the fact finder by substituting its judgment. It is not the function of the Court "to weigh the conflicting evidence and inferences, and determine credibility of witnesses." *Boeing,* 411 U.S. at 375.

Finally, Sharp contends that Mr. Chernow's economic model included a projection of lost interest income, and characterizes that projection as an improper attempt to obtain prejudgment interest. *Heatransfer Corp. v. Volkswagenwerk, A.G.,* 553 F.2d 964, 986 & n.20 (5th Cir.

1977), *cert. denied,* 434 U.S. 1087 (1978). The model characterizes this element of damages, however, as lost interest income which is normally recoverable in this circuit. Since the model made no attempt to base this recovery on the statutory claim condemned in *Volkswagenwerk,* the Court finds no error in the model. *Multiflex,* 709 F.2d at 996-97.

NEW TRIAL

The decision to grant or deny a motion for a new trial is one committed to the sound discretion of the Court. *Reeves v. General Foods Corp.,* 682 F.2d 515 (5th Cir. 1982); *Martinez v. Food City, Inc.,* 658 F.2d 369 (5th Cir. 1981). The standard here is lower than that applicable under a motion for judgment n.o.v. or a directed verdict. The trial judge may set aside the verdict and grant a new trial if, in his opinion, the verdict is either against the great weight of the evidence or will result in a miscarriage of justice, even though there may be substantial evidence in support. *Shows v. Jamison Bedding,* Inc., 671 F.2d 927 (5th Cir. 1982). Moreover, the court is not required to view all the evidence in a light most favorable to the non-movant, but may weigh and evaluate the evidence in much the same fashion as the jury. This Court will not order a new trial, however, merely because it may have reached a different verdict. The verdict must be contrary to the *great* weight of the evidence. *Cf. United States v. Bucon Const. Co.,* 430 F.2d 420 (5th Cir. 1970). *See generally* 11 C. Wright & A. Miller, *Federal Practice & Procedure: Civil* § 2806 (1973).

The trial of this antitrust action was both lengthy and exceedingly complex. The issues presented, and their evidentiary support, were ably contested by the attorneys

for BEC and Sharp. In its brief in support of the motion for a new trial, Sharp has provided the Court with a detailed argument of the evidence adduced at trial. Nonetheless, the Court has conducted its own exhaustive review of the 13 volume transcript of the proceedings. And while that review has revealed conflicting evidence on virtually every point, the Court is unable to conclude that the jury's verdict is against the great weight of the evidence.

Court's Instructions to the Jury

When reviewing alleged error in the jury instructions, the district court will not grant a new trial or otherwise disturb the jury's verdict "unless refusal to take such action appears to the court inconsistent with substantial justice." Rule 61, Fed. R. Civ. P. Moreover, challenged jury instructions will not be considered in isolation from the remainder of the charge. Rather, the court will look to the charge as an "integrated whole", together with the allegations presented in the complaint, the evidence adduced at trial and arguments of counsel. *Bunch v. Walter,* 673 F.2d 127, 131 (5th Cir. 1982); *Coughlin v. Capitol Cement Co.,* 571 F.2d 290, 300 (5th Cir. 1978) (citing cases). "If, viewed in that light, [they] are comprehensive, balanced, fundamentally accurate and not likely to confuse or mislead the jury, the charge will be deemed adequate." *Bunch, supra* at 132, *quoting, Scheib v. Williams-McWilliams Co.,* 628 F.2d 509, 511 (5th Cir. 1980).

In the brief accompanying the Rule 59 motion, Sharp advances detailed arguments which allege error in the inclusion or exclusion of 13 separate instructions. These arguments are, however, identical to those rejected by

the Court both in conference and on the record outside the presence of the jury. Sharp's Point of Error Nos. 11-15, 17, 21 & 22 in the main seek repetitive instructions which were covered elsewhere in the charge. Point of Error Nos. 16 & 19 deal with the "rule of reason" standard and the "complaints followed by termination" issue. Both of these contentions have been adequately discussed and denied earlier in this Memorandum. In Point of Error No. 18, Sharp attacks the circumstantial evidence instruction given by the Court. This instruction, however, is identical to that found in Devitt & Blackmar, *Federal Jury Practice and Instructions,* §§ 15.02 & 72.02 (1977), and approved by the Fifth Circuit in *United States v. Clark,* 506 F.2d 416 (5th Cir.), *cert. denied,* 421 U.S. 967 (1975). In Point of Error No. 20, Sharp alleges that use of the word "understanding" "improperly allowed and encouraged the jury to find an antitrust violation based on something less than an agreement." The Court finds that, reading the charge as a whole but specifically in regard to that section dealing with Special Interrogatory No. 1, inclusion of the word "understanding" was in no way misleading or confusing. Finally, in Point of Error No. 23, Sharp alleges that the Court mischaracterized Sharp's defense to this action. Sharp's attorneys ably argued their client's case to the jury, including all possible defenses. Reading the challenged instruction as part of the "integrated whole", the Court concludes that if such a charge was erroneous, it was clearly harmless.

Admissability of Evidence

Also in the Rule 59 motion, Sharp challenges the Court's admission of the "Gold Memorandum" and the

exclusion of several of Sharp's exhibits and the testimony of two defense witnesses associated with the excluded exhibits. The Fifth Circuit has repeatedly emphasized that "the trial court generally has broad discretion in the admission of evidence." *Carlton v. Shelton,* 722 F.2d 203, 206 (5th Cir. 1984); *Ramos v. Liberty Mutual Ins. Co.,* 615 F.2d 334, 340 (5th Cir. 1980). After a careful review of the record, the Court finds no error in the admission of the Gold Memorandum or the exclusion of Sharp's exhibits or testimony.

Sharp first challenges the authenticity of the Gold Memorandum. Determination by the court of the authenticity of an exhibit is committed to the sound discretion of the court, *United States v. Gorel,* 622 F.2d 100 (5th Cir. 1979), *cert. denied,* 445 U.S. 943 (1980), and requires only a prima facie showing. As is the case here, a document's "physical appearance, . . . contents, and letterhead may in combination authenticate the writing." 5 Weinstein & Berger, *Weinstein's Evidence,* ¶ 901(b)(4) [02] at 901-51 (1983); Rule 901 (b)(4), Fed. R. Evid. Sharp's contention that the memorandum is not relevant with sufficiency. Evidence is relevant if it has "any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence." Rule 401, Fed. R. Evid.

Sharp further challenges the exclusion of Defendant's Exhibits Nos. 52-55, 81, 81a, 82 & 82a. Exhibits 52-55 were excluded by the Court as hearsay. Sharp alleges that even if the exhibits were hearsay, they fall under the "state of mind" exception to the general rule. Rule 803 (3), Fed. R. Evid. Sharp also alleges that the excluded testimony of defense witness Burkholder is within the same exception. The Court again rejects this position.

Evidence presented outside the presence of the jury revealed the disputed exhibits and testimony relate to policies and/or subjective states of mind too far removed in time from the termination to be relevant to the facts of this case. Sharp's Exhibit Nos. 81, 81a, 82 & 82a and the associated testimony of defense witness Wiles all relate to the alleged appreciation of rental property purchased by Plaintiff Ehrensberger after termination. Sharp contends that such evidence is relevant to the issue of mitigation of damages. The Court concludes that, given the speculative nature of this evidence, its exclusion, if erroneous, was clearly harmless.

Finally, Sharp contends that the attorney for BEC engaged in improper argument to the jury in regard to use of deposition testimony. The Court concludes that Plaintiff's attorney was not attempting to denigrate the deposition testimony of Mr. Kawai. Regardless, even if such argument was improper, it was cured by the Court's instruction to the jury dealing with the use of deposition testimony.

For the reasons stated above, the Court hereby ORDERS:

Defendant's Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, For a New Trial, is in all respects DENIED.

This is a FINAL JUDGMENT.

The Clerk shall file this Memorandum and Order and provide counsel for all parties with a true copy.

DONE at Houston, Texas this 28th day of September 1984.

/s/ WOODROW SEALS
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-2618

D.C. Docket No. CA-H-78-1020

BUSINESS ELECTRONICS CORP.,
Plaintiff-Appellee,

versus

SHARP ELECTRONICS CORP.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

Before CLARK, Chief Judge, THORNBERRY, and JONES, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that plaintiff-appellee pay to defendant-appellant the costs on appeal, to be taxed by the Clerk of this Court.

January 21, 1986

JONES, Circuit Judge, concurring.

ISSUED AS MANDATE:

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-2618

BUSINESS ELECTRONICS CORP.,
and KELTON EHRENSBERGER, ETC.,
Plaintiffs-Appellees,

versus

SHARP ELECTRONICS CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas

ON SUGGESTION FOR REHEARING EN BANC
(Opinion 1/21/86, 5 Cir., 198_, ____F.2d____)

(February 24, 1986)

(Filed February 20, 1986)

Before CLARK, Chief Judge, THORNBERRY and JONES, Circuit Judges.

PER CURIAM:

(√) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel

nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Charles Clark
CHIEF JUDGE